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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1628

TELEPROMPTER CORPORATION and
CONLEY ELECTRONICS CORPORATION,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., CALVADA PRODUCTIONS, a joint venture, JACK CHERTOK TELEVISION, INC. and DENA PICTURES INCORPORATED,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

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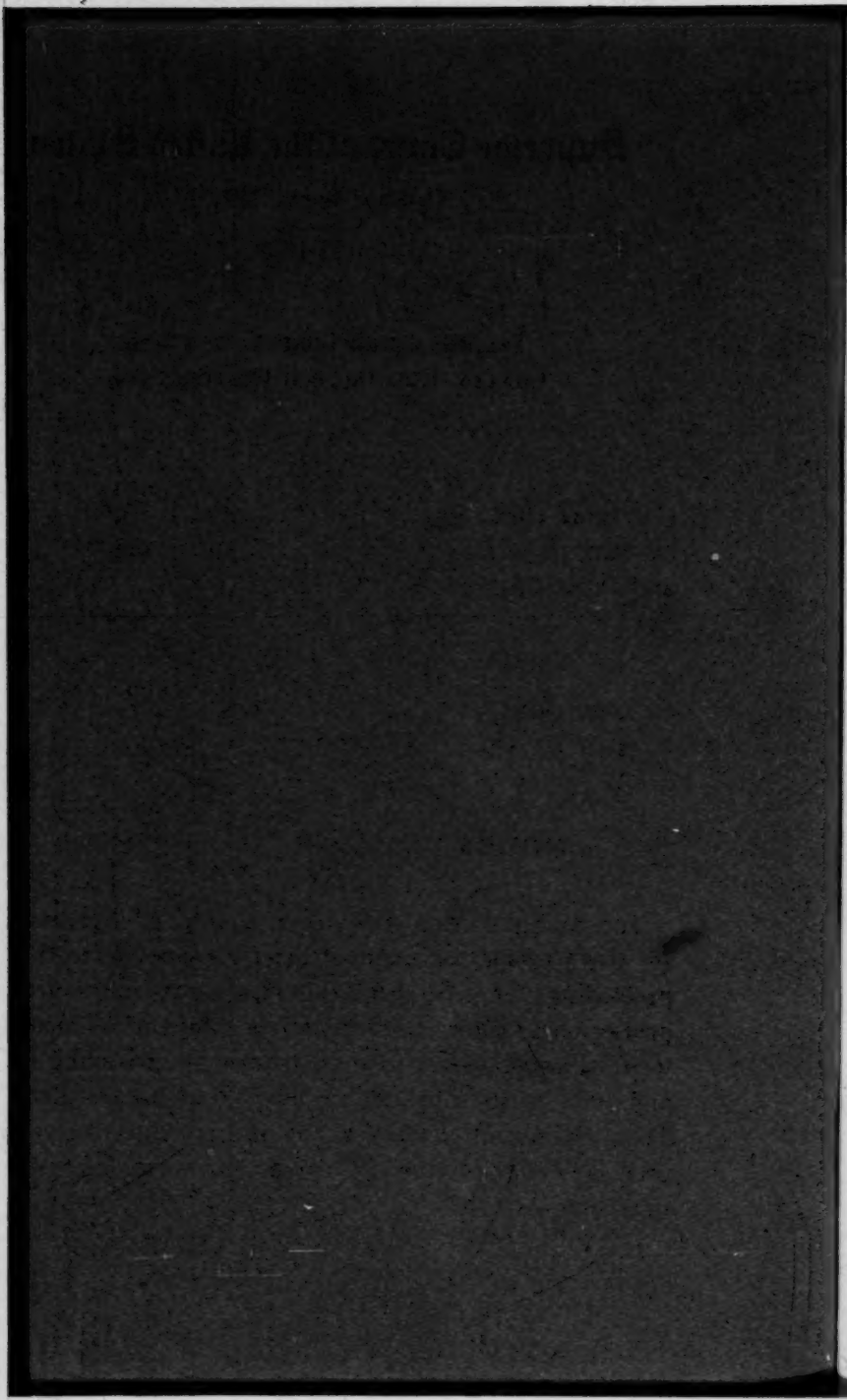

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Authors League of America respectfully petitions for leave to file the annexed brief *amicus curiae* in this proceeding. The Authors League is a national society of professional writers and dramatists. Many of its members write screenplays and television scripts; and many books and plays by its members are adapted as motion pictures. Their compensation depends on the proceeds derived by producers of these films and programs, from theatres and television stations.

Unauthorized cable-television exhibition of motion pictures and television programs through distant-signal importation or cablecasting damages these writers (i) by depriving them of compensation and (ii) by depriving producers of income which helps finance further motion picture and television production.

A principal purpose of The Authors League is to express its members' views on fundamental copyright issues. Because this appeal presents such an issue, of vast consequence to American authors, the League respectfully requests leave to file the annexed brief. The attorneys for respondents Columbia Broadcasting System et al have consented to the filing of the brief. The attorneys for petitioners informed the attorney for The Authors League that they could not consent to filing.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc., as amicus curiae

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BRIEF OF THE AUTHORS LEAGUE OF AMERICA, AS *AMICUS CURIAE*

Interest of The Authors League

The members of The Authors League are professional writers whose books and plays frequently are adapted (i) as motion pictures which are exhibited on television following theatrical exhibition and (ii) as television programs.

Their compensation for these uses of rights granted them under the Copyright Act depends on the proceeds derived by producers of these films and programs, a significant portion of which consists of payments by television stations which broadcast them. Frequently these authors are paid a part of the producers' profits or income from the film or program. In addition, many League members write motion picture screenplays and television scripts, and their compensation similarly depends on the producers' income or profits.

POINT I

Teleprompter's unauthorized exhibition of plaintiffs' copyrighted programs was infringement.

(i) Exhibition Through Importation of Distant Signals

The Court of Appeals held that the *Fortnightly* rationale only applied when a cable system exhibited copyrighted programs to its audience by retransmitting signals which "were already in the community", i.e., broadcasts that any member of the system's audience could have received off-the-air from the local television station, had he used a more effective antenna. (In those circumstances, a cable system —performing no cablecasting functions—was deemed to provide the service of such an antenna.)

The Court of Appeals therefore concluded that Teleprompter's cable systems did infringe the plaintiffs' copyrights when they exhibited copyrighted programs to their audience by importing broadcasts of the programs from stations in other areas ("distant signals"). These pro-

grams, carried over long distances by microwave transmission and other means, could not have been received by members of the cable systems audience, had these individuals used advanced antennae located in their own reception area.

We respectfully submit that the Court of Appeals correctly decided this aspect of the case. In the *Southwestern Cable* and *Midwest Video* decisions this Court recognized that cable systems perform two separate functions. (*United States* v. *Southwestern Cable Co.*, 392 U.S. 157; *United States* v. *Midwest Video Corp.*, 406 U.S. 649). The first cable function was considered in *Fortnightly*, *i.e.*, supplementing local broadcasting by facilitating the reception of local stations' signals in their own area. The second function is at issue here, *i.e.*, the transmission to a cable system's audience of programs broadcast by distant stations which are well beyond the range of local antennae in the cable systems' market area. When a cable system performs the second function, it is not merely supplementing its customers' "viewing". Quite the contrary, it is actively engaged in exhibiting to its audience copyrighted works which they could not receive independently from broadcasts of the distant station; these are broadcasts which are not "already in the community". The cable system is then doing what any local television station does when it rebroadcasts a copyrighted program broadcast by a television network or other station. If the local station makes a rebroadcast without permission it is guilty of copyright infringement. Under the Copyright Act and the *Fortnightly* rationale, the cable system which exhibits to its audience a program imported from a distant station is also infringing copyright.

Importation of such distant broadcasts is another method of exhibiting motion pictures or television programs, to audiences. It is essentially by "exhibition"—on a screen—that television stations, motion picture theatres and cable TV systems "perform" most copyrighted works. No "live" performance is staged by the motion picture theatre, the television station or the cable system when they bring a motion picture to their respective audiences; nor are "live" performances involved in most other television dramatic programs. In each instance, the movie theatre, the television station or the cable system transmits a previously recorded performance. In this way it "performs" the copyrighted film or program, and it also exercises the other rights granted in Section 1(d) i.e. "to exhibit, (perform), represent, produce, or reproduce [the work] in any manner or by any method whatsoever . . ." (17 U.S.C.)

Cable television's exhibition of a copyrighted film or program to its audience, by importing distant signals, produces the same injuries to a copyright owner as an unauthorized rebroadcast by a local station. The producer may be prevented from licensing the work for broadcast by a television station in the area. Moreover, it is denied compensation for exhibiting the work to an audience in a different market area; the fee paid by the distant station for its authorized broadcast was based on the exhibition to its audience in its market area. And since the author's compensation depends on the producer's income or profits, he too is injured by the unauthorized exhibition.

(ii) Exhibition Through Cablecasting

In *Fortnightly*, this Court pointedly indicated that it was not dealing with cablecasting systems, *i.e.* those which also perform the broadcasters' functions—originating programming, selling advertising and networking. However, the Court of Appeals ruled that cablecasting systems nevertheless are covered by the *Fortnightly* rationale when they retransmit local broadcasts of copyrighted works, within the television broadcasters' market area. We agree with the plaintiffs that the Court erred on this point. A cablecasting system is not merely enhancing the local reception of local broadcasting. It exploits local broadcasts of plaintiffs' copyrighted works to increase and better serve its cablecasting audience. The plaintiffs' copyrighted works are employed to develop and hold an audience to which the cablecaster sells its own advertising and programming. This audience does not merely receive enhanced reception of the local broadcasts; it cannot and does not subscribe only for such service. What it receives is the exhibition of a package of programs presented to enhance the cablecaster's profits from advertising as well as subscriptions. As the cablecaster's audience increases, thanks to the unauthorized use of plaintiffs' (and other) copyrighted programs, so does the volume and income of the cablecaster's advertising.

CONCLUSION

It is respectfully submitted that the Court of Appeals' decision, as it relates to the importation of distant signals, should be affirmed; and that the Court's decision, as it relates to cablecasting, should be reversed.

Respectfully submitted,

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